United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. SAWYER and FRANCES SAWYER, his wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, his wife, *Appellants,*

vs.

RAYMOND S. GRAY and SENA GRAY, his wife; W. A. GRAY and LOIS A. GRAY, his wife; CHARLES S. FORBES and ADELAIDE F. FORBES, his wife; FRANK L. HUSTON, JOHN H. PATTEN and DORA W. PATTEN, his wife; W. W. BARR and GERTRUDE G. BARR, his wife, and MILWAUKEE LAND COMPANY, a corporation, *Appellees.*

No.....

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLEES

F. M. DUDLEY,
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The district court entered a judgment in favor of the defendants below, who are appellees here, upon sustaining their general demurrer to the third amended bill of complaint, and the complainants have appealed from that judgment. Therefore, the question presented to this court is whether the facts set forth in the bill entitle complainants to any relief.

The complainants claim that the United States has issued to certain of the defendants patents for public lands which should have been patented to the complainants, and that the defendants now hold these lands as trustees for the complainants.

The essential facts set forth in the bill of complaint are as follows:

That on January 25, 1899, the State of Washington, under the Act of Congress of August 18, 1894, requested the Commissioner of Public Lands to extend the United States surveys to Township 11 North, Range 4 E., W. M., in the state of Washington; that this survey was made and the plat thereof filed in the United States Land Office at Vancouver, Washington, on April 10, 1901; that the Act of August 18, 1894, provides that the land so surveyed shall be reserved until the expiration of sixty days from the filing of the survey, during which period of sixty days the state asking for the survey may select any of such lands in satisfaction of the grant made to it by the United States upon its admission into the union; that the survey included the lands in controversy, but that the State of Washington did not select them.

It is further alleged that prior to the filing of the survey, to-wit: On March 29, 1900, F. A. Hyde

& Co. made application to the United States Land Office at Vancouver, to enter the lands in lieu of certain lands within a forest reserve, and which it conveyed and relinquished to the United States; that the lands in controversy were at that time vacant, non-mineral, public lands, subject to homestead entry; that by the aforesaid application F. A. Hyde & Co. became the equitable owners and entitled to a patent to said lands; that the Department of the Interior on December 21, 1901, rejected the application for the reason that at the time when the application was made the lands were not subject to entry because of the fact that the time had not yet expired within which, under the Act of Congress of August 18, 1894, they were to be reserved for selection by the State of Washington; that thereafter, on March 3, 1902, F. A. Hyde & Co. filed a second application in the United States Land Office at Vancouver, Washington, to enter the said lands in lieu of certain other forest reserve lands owned by it and which it then conveyed and relinquished to the United States, and that it thereby became the equitable owner of said land and entitled to a patent therefor; that this second application of F. A. Hyde & Co. was forwarded by the officers of the Land Department at Vancouver, Washington, to the Commis-

sioner of the General Land Office for consideration and approval, and that the said application has never been acted upon by the Commissioner. That both of the aforesaid applications by F. A. Hyde & Co. were made pursuant to the Act of Congress of June 4, 1897. That after the aforesaid applications of F. A. Hyde & Co. had been filed, certain of the defendants made application to purchase the lands and in due course received patents therefor, and that all of the defendants are either such patentees or their grantees, all having acquired their rights with knowledge and notice of the complainants' claim. That the patents so issued were issued by mistake in that the United States officials overlooked the fact that the second application of F. A. Hyde & Co. was still pending.

The relief asked for is, (1) a decree declaring the plaintiffs to be the sole and exclusive owners of such lands free and clear of any right, title or interest therein or thereto of or belonging to any of the defendants, and declaring the defendants, so far as they or any of them have any apparent or legal title to such lands under or by virtue of the said patents, to be trustees thereof holding the same for the sole and exclusive use of the plaintiffs and requiring the defendants to execute such trusts by

a conveyance of the lands to the plaintiffs; or (2) in the alternative the entry of a decree declaring the various deeds conveying the lands, or any thereof, to the defendants and all other deeds of conveyance of the lands to the defendants made by and between the several defendants, or any of them, to be wholly void and ordering the same to be cancelled and set aside of record; (3) coupled with the foregoing prayers is a prayer for general relief.

The bill does not charge that the patents under which the defendants claim were procured, or that any of the conveyances made by the patentees, or their grantees, were made fraudulently or through any fraud perpetrated upon the plaintiffs. The position of the plaintiffs is that prior to the issuance of the patents they had acquired a claim or right to, or interest in the lands, which was prior in time and, as they contend, therefore superior in right to the interest conveyed by the patents.

ARGUMENT.

The Land Department of the United States is a quasi judicial tribunal charged with the duty of supervising the disposition of the public lands of the United States under the provisions of the acts of Congress authorizing such disposition, and the

patents of the United States issued by the Interior Department not only operate as deeds conveying the legal title to the lands embraced in the patent to the grantee but they are also evidence of an adjudication by the Department that the lands so conveyed were public lands subject to be so conveyed and that the patentee has complied with all of the provisions of the particular act of Congress under which the patent is issued entitling him to a conveyance thereof. This determination, in all cases where it has jurisdiction, is not subject to collateral attack and is, in the absence of fraud or mistake of law, conclusive. Of course, if the land with which the proceeding before the Department is concerned, is not public land of the United States over which it has jurisdiction under the authority of the public land laws, the decision of the Department with respect thereto is a nullity.

Dolan vs. Carr, 125 U. S. 618.

But where the Department has jurisdiction of the land, it belonging to the United States and being subject to disposition under the public land laws of the United States, the patent when issued operates, as above stated, to convey to the patenteee the legal title. If, however, through fraud or mistake of law the legal title is thus conveyed to and vested in A,

although B was in equity entitled thereto, B can maintain an action to have A declared a trustee, holding the title to the land for his benefit, and require a conveyance thereof to B. It is evident, however, that parties who do not connect themselves with the United States, showing a right or interest derived from the United States, cannot be heard to assail the judgment of the Interior Department, or the conveyance issued by the United States pursuant thereto unless such conveyances be an absolute nullity.

It will be noted that the complainants allege and apparently rely upon two totally distinct attempts to select the land in question, the first made March 29, 1900, and the second March 3, 1902. As the condition of the land at the time of the attempted selection in 1900 was materially different from its condition at the time of the second attempted selection in 1902, it is necessary to consider to some extent these attempted selections separately.

I.

(a) March 29, 1900, when the first application to select this land was made, it was unsurveyed land. The bill alleges (par. 3) that the township plat was filed in the United States Land Office at Vancouver,

Washington, April 10, 1901. It is the settled doctrine of public land law that lands are not considered as surveyed lands until the township plat has been filed.

U. S. vs. Curtner, 38 Fed. Rep. 1, 9-10.

S. P. R. Co. vs. Burlingame, 5 L. D. 415, 417, and cases cited.

It is further settled that the survey does not identify but creates the sections and townships.

> "Even after a principal meridian and a base line have been established and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey but they are created, and although a surveyor may, in advance of the making of the subdivision of the township by the deputy of the United States Surveyor General, run lines with the greatest practical exactness from the corners established on the exterior lines of the township to ascertain the bounds of any given quarter-quarter section, still when the survey comes to be made under the direction of the Surveyor General the difference between the two surveys may be such that the forty acre lot which, under the private and theoretically the more accurate survey appear to fall within the lands listed to the state, will be excluded from the list, or vice versa."

Robertson vs. Forrest, 29 Cal. 317, 325.

Middletown vs. Lower, 30 Cal. 596, 604-5.

Bullock vs. Rouse, (Cal.) 22 Pac. Rep. 919, 920.

Smith vs. City of Los Angeles (Cal.), 112 Pac. Rep. 307, 310.

It follows that the application of Hyde & Co. made March 29, 1900, for the west half of section 32, township 11 north, range 4 E., W. M., *eo nomine* was an impossibility for such Government subdivisions did not then exist.

(b) It is alleged that the application made March 29, 1900, was rejected by the Interior Department December 31, 1901, upon the ground that it was prematurely made in that the lands were, at the time of the filing of the aplication by Hyde & Co., reserved to permit the State of Washington to make selections in this township. By act approved August 18, 1894, 28 Stat. 372, 394-5, it was provided that the governors of certain states, including the State of Washington, might apply to the Commissioner of the General Land Office for the survey of any township or public lands remaining unsurveyed and that the lands that might be found to fall within the limits of such township, as ascertained by the survey, should be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise for a period to extend

from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the state might select any of such lands, not embraced in any valid adverse claim for the satisfaction of such grants.

It is charged in the third paragraph of the bill that the State of Washington on January 25, 1899, requested the Commissioner to survey the public lands in the township in which the land in controversy is situated under the provisions of this act and that the same were surveyed pursuant to this request and the plat filed in the district land office April 10, 1901. The land in question was therefore reserved "from any adverse appropriation by settlement or otherwise except any rights that may be found to exist of prior inception" from the date of the application January 25, 1899, until the expiration of sixty days from the filing of the township plat, namely, until June 9, 1901. As the Forest Reserve Act, under which the complainants claim, permitted the selection only of vacant lands "open to settlement" the land in this township was not subject to selection during the period between January 25, 1899, and June 9, 1901, during which period

the first application by the complainants was made and this application was therefore properly rejected. It is charged in the bill that on March 29, 1900, at the time Hyde & Co. made this application, there was in force and generally observed in the Land Department and particularly in the United States Land Office at Vancouver, Washington, a custom, rule and regulation whereby such applications were received and filed and held subject to the possibility of the land being selected by the state, and that according to such custom and rule, if the land was not selected by the state at the expiration of the period of reservation, the selection theretofore made by the applicant under the Forest Reserve Act became effective as of the date of its filing and it is further charged that this particular application was so received and held (Par. 4 of Bill).

The rules and regulations, even of the Interior Department, cannot set aside or annul the positive provisions of the act of Congress and *a fortiori* a rule existing in the district land office could have no force or effect whatsoever in protecting an application made under the Forest Reserve Act at a time while the lands were reserved. As held in *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 301, the district land officers were totally without authority to make

any rules or regulations under this act, and the settled construction of this act by the Department is that it operates as a withdrawal of the lands for the period named.

Ziegler vs. State of Idaho, 30 L. D. 1.

McFarland vs. State of Idaho, 32 L. D. 107.

Kay vs. State of Montana, 34 L. D. 139.

Thorpe et al. vs. State of Idaho, 35 L. D. 640.
Id., 36 L. D. 479.

Moreover, in the Sundry Civil Appropriation Act of March 3, 1893 (27 Stat. 592), Congress provided:

> "That the states of North Dakota, South Dakota, Montana, Idaho and Washington shall have a preference right over any person or corporation to select lands subject to entry by said states granted to said states by the act of Congress approved February 22, 1889, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States and provided further that such preference right shall not accrue against bona fide homestead or pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office in said states."

It will be noted that this act is very similar to the act of August 18, 1894. It is held, however, that the later act does not repeal the earlier.

McFarland vs. State of Idaho, 32 L. D. 107.

Kay vs. State of Montana, 34 L. D. 139.

May 10, 1893, the Interior Department promulgated certain regulations controlling the execution of that act. Paragraph 2 of these regulations provided:

> "During said period of sixty days no person not claiming in virtue of settlement existing at the date of filing of the plats, nor corporation, will be allowed to enter the lands subject to selection by the respective states, but the law cannot be held to inhibit during said period, the selection of lands previously granted to a corporation by Congress as, for instance, the granted sections within the primary limits of a railroad grant."
>
> 16 L. D. 462.

The court takes judicial notice of these rules and regulations.

> *Caha vs. U. S.*, 152 U. S. 211, 221.
>
> *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 301, 309.

No new or additional regulations were issued after the passage of the act of 1894, and it is obvious that the regulations prescribed under the act of 1893 were deemed as applicable also to the act of 1894, but whether this be so or not the regulations under the act of 1893 constituted a departmental interpretation of the statute which was equally applicable to the statute of 1894 and under this interpretation the local officers were without authority

to accept the filing of Hyde & Co. prior to the expiration of sixty days from the filing of the township plat.

Further, although the bill does not refer to the act of 1893, or to the regulations issued thereunder, it is obvious that this act and these regulations were applicable to the township in question and that under this act and these regulations the land was not subject to selection at the time Hyde & Co. attempted to select it March 29, 1900, and that therefore the selection was properly cancelled by the Interior Department.

(c) By the subsequent attempted selection of this land made by Hyde & Co. March 3, 1902, that compnay and the complainants, as claiming under it, acquiesced in the rejection of the original attempted selection of March 29, 1900, and waived any rights which they might otherwise have had thereunder. The right of selection given by the Forest Reserve Act of 1897 is confined to vacant land open to settlement. The complainants cannot therefore be heard to contend that the attempted selection of March 29, 1900, operated to appropriate this land, and at the same time contend that it was vacant land open to selection in 1902 and when they made the second application on March 3, 1902, basing it, as they

necessarily did, upon a claim that the land in question was vacant and open to settlement they, of necessity, abandoned and relinquished all claims under the original attempted selection. This is especially true in view of the fact that by the second application Hyde & Co. offered for the exchange entirely different lands as a basis of their selection.

II.

It is charged in the fifth paragraph of the bill that on March 13, 1902, Hyde & Co. again made application to select the land in controversy under the provisions of the act of June 4, 1897. The allegation is that "pursuant to the terms of said act of June 4, 1907, and pursuant to the customs, rules and regulations in force in, and observed by, the General Land Office, and officials of the Land Department of the United States" Hyde & Co. "made a second selection and application for and entry upon" the land in controversy in lieu of other base land formerly owned by Hyde & Co. and "theretofore surrendered to and accepted by the United States Government in accordance with the provisions of said act of June 4, 1897, and made due proof of all facts required to be proven under the terms of said act to entitle said F. A. Hyde & Co. to

the lands so selected. Said selection was made in writing as required by law and the said paper, together with certificates, affidavits and other papers therein referred to, and as required by the rules and practice of the United States Land Department, were duly filed with the United States Land Office at Vancouver, Washington, on said March 3, 1902; that at the time of filing said second application and selection of said land, the said land was a part of the surveyed public lands of the United States unappropriated and subject to entry and selection as aforesaid, and by virtue of the said second application thereof and entry thereon as aforesaid by the said F. A. Hyde & Co. and the complainants, the said F. A. Hyde & Co., their successors and assigns thereupon became the equitable owners of said land, and became entitled to patent therefor''. It is further alleged that prior to the time of making this application Hyde & Co. were the owners of certain lands included in a forest reserve in California and that they had, as the owners thereof, ''duly relinquished and reconveyed the said lands so relinquished'' and ''that the second application was accompanied by an abstract of title, duly authenticated and certified, showing chain of title to the lands so relinquished from the Government back

again to the United States, together with due proof from the public officers showing that the said land was relinquished, was free from encumbrances of any kind, and that all taxes thereon to the date of said second application had been paid, together with affidavits showing the said lands so selected in lieu thereof were non-mineral and non-saline in character and unoccupied; and that the said F. A. Hyde & Co. in all other respects conformed to the acts of Congress and laws of the United States and the customs, rules and regulations of the Land Department of the United States".

It is then alleged that this second application, with the papers accompanying the same, were received and filed by the officers of the Land Department at Vancouver, Washington, and forwarded to the Commissioner of the General Land Office for consideration and approval, "all in accordance with the acts of Congress applicable thereto."

It is obvious that these allegations are for the most part not allegations of fact. They are all, or nearly all, conclusions of the pleader only. The court cannot determine, from an inspection of the bill, what was done, or whether the proofs furnished were those required by law, or the regulations of the Department, and the failure to allege facts from

which the court can see that the selection was sufficient to pass an equitable interest in the land is fatal to a bill of this nature.

> *James vs. Germania Iron Co.* (C. C. A.), 107 Fed. Rep. 597, 600.
>
> *Le Marchel vs. Teagarden* (C. C. A.), 152 Fed. Rep. 662, 665-6.
>
> *Durango Land & Coal Co. vs. Evans* (C. C. A), 80 Fed. Rep. 425, 430.

Disregarding, however, the conclusions of law that these acts were duly done and in conformity with the rules and regulations and that thereby F. A. Hyde & Co. and the complainants as their successors, secured an equitable title to the land, and treating the allegations as sufficient to show that Hyde & Co. made application at the District Land Office at Vancouver to select the land in question March 2, 1902, and at that time (although this is contrary to the allegation) recorded a deed conveying the base land to the Government, yet the allegations totally fail to show that by these proceedings an equitable interest in the land was acquired. The act of Congress, approved June 4, 1897, under which complainants assert their rights, provides:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of the public forest reservation, the settler or owner thereof may,

if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim of patent and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the land selected; Provided, further, that in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

After the passage of this act the Secretary of the Interior promulgated certain rules and regulations for the purpose of carrying the same into effect, which rules are found in 24 L. D. 589, 592. These rules, among other things, provide:

"16. Where final certificate or patent is issued, it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry which must be filed as required by paragraph 15 with the affidavit therein called for * * *

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the tract applied for."

In *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 301, 310, *et seq.*, the Supreme Court, construing this act and these requirements, held that the local land officers had no functions to perform under this act except to forward the application to the office of the Commissioner of the General Land Office; that the filing of the papers in the District Land Office did not, and could not, make out an equitable title in the selector and that a complete equitable title was not made out and could not exist until there had been a favorable decision in the office of the Commissioner of the General Land Office regarding the sufficiency of the complainant's proof of his right to the selected land. They further held, upon the contention that the selector became the equitable owner of the land by the relinquishment of its title to the base land, that such relinquishment constituted a mere offer, and that the duty of passing upon the proofs tendered was in the Commissioner of the General Land Office and not in the district land officers, and that until the Commissioner of the General Land Office had passed upon and accepted the proofs tendered, there was no acceptance of the offer and no equitable estate created in the applicant. They say:

> "There must be a decision made somewhere regarding the rights asserted by the selector of

land under the act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute and the selector cannot decide the question for himself. * * *

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms and the further fact that the Land Department had adopted Rule 18 above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector so that he became vested with the equitable title to the land he assumed to select."

See, also:

Pac. Live Stock Co. vs. Isaacs (Ore.), 96 Pac. Rep. 460, 464.

In this case the court say:

"No competent proof, however, of any relinquishment and selection by Hyde was offered, but waiving such matters and considering that such proof was offered, does that invest him with any right in or to the lands so selected as against even a mere trespasser at any time before final acceptance thereof by the Secretary of the Interior, or the issuance of a patent? Whatever right he may eventually acquire in such selected lands is not based upon a settlement thereon

> impliedly or expressly required by the Government as a condition precedent to the acquisition of title as would be the case of a homesteader pre-emptor but in its essence it is a mere exchange of lands and neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

In *U. S. vs. McClure,* 174 Fed. Rep. 510 (affirmed 187 Fed. 265), the United States Circuit Court for the District of Oregon held that the making and recording of a deed conveying base lands to the United States and the tendering of such deed to the Land Department in exchange for other lands does not pass the title to the lands offered in exchange until the deed is accepted.

> "The mere execution and recording of a deed and the tender thereof vests no title in the Government. Until the deed and title are examined and approved it is a mere assertion by the applicant of his title and right to make the selection. * * * The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another and the title does not pass to either party until the exchange is effected."

The case of *Daniels vs. Wagner,* decided by this court on the 5th of May, 1913, and reported in vol. 205 Fed. Rep. page 235, is identical in all its essential features with the case at bar and is absolutely decisive. In that case this court decided that a

selector of lieu land in exchange for patented land within a forest reservation under the act of June 4, 1897, acquires no vested right or equitable interest in the land selected merely by the filing of deeds of relinquishment and lieu selection papers in the Land Office.

Applying these decisions to the allegations of the bill it is evident that those allegations are insufficient to show that Hyde & Co. or the complainants acquired an equitable title to the land involved in this controversy. The utmost that can be said is that they tendered a conveyance of the base lands to the Government and offered to make the exchange. It is not claimed that this offer was ever accepted. Upon the contrary it is expressly alleged in the sixth paragraph of the bill that November 21, 1902, "the Land Department of the United States promulgated a rule and order suspending all further proceedings upon entries made with any of the so-called 'Hyde Scrip', which order has never been revoked and is still in force and which order affected said second application". It appears, therefore, that Hyde & Co., or the complainants as their successors, have paid nothing to the Government for this land; that they still retain the legal title to the base land since the delivery of

the deed has never been accepted by the United States, and that they are not the equitable owners thereof.

Under these circumstances they are not in a position to assail the title which the Government of the United States has conveyed by its patent to the defendants.

In *Campbell vs. Weyerhaueser,* 161 Fed. Rep. 332, the Court of Appeals for the Eighth Circuit say:

> "In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land which he claims under those acts prior to Jan. 1st, 1898, and before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. * * * One who has never by acceptance of a grant, or by settlement, and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another may not maintain a bill in equity to charge the title under a patent with a trust in his favor. * * * The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant, which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open

to entry thereunder, is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the land department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property, and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees and grantees are maintained; but there is no presumption of irreparable injury from the unlawful refusal of the Government to sell land in which the applicant has secured no equitable interest and hence such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measureable in damages, he may purchase another tract, and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production rather than for the prevention of a multiplicity of suits."

See, also:

Smelting Co. vs. Kemp, 104 U. S. 636, 637.

Baldwin vs. Keith, (Okla.), 75 Pac. Rep. 1124.

Loney vs. Scott, (Ore.), 112 Pac. Rep. 172, 175.

III.

Moreover, complainants are clearly guilty of laches. Patents for these lands were issued to three patentees in 1905, 1907 and 1908 respectively. The defendants Gray and wife, Barr and wife, Huston and the Milwaukee Land Company are grantees respectively of the patentees. The complaint alleges no adequate excuse for the complainants' delay until November, 1910, before commencing this action.

For the foregoing reasons we respectfully submit that the decree should be affirmed.

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